analogous to a tortious feoffee, and that the tort may be cured by lapse of time. When cured it leaves the adverse possessor with a clear right to just what he claimed. If he claimed that the fee was in some person other than the true owner, the latter would be barred, and the fee would be in the third person. If the defendant in the principal case filed the usual homestead application and received permission to enter from the government, he would be a mere licensee and could not on either theory dispute the title of the United States. Assuming, however, that he entered without the knowledge or permission of the government, would the mere recognition that it owned the fee be sufficient on either theory to pass the title to the government? The only possible estoppel is *in pais*. This form of estoppel arises out of either contract or conduct.[3] Clearly no contract basis exists here, and to create an estoppel from conduct it is essential that one party should have so acted on a representation of the other that it will be a detriment to him to allow the falsity of the representation to be asserted. If there was no relation between the parties, no basis for an estoppel can be found, and the adverse possessor would hold the fee. On the other theory, however, the adverse possessor would get by lapse of time no more than he claimed, which was not the fee, but a right to acquire a homestead patent. Under a regulation of the homestead laws he has lost that right here. As he has claimed for the statutory period that the fee is in the United States, it would, under this theory, acquire the fee, — a result most surprising from a practical standpoint.

COURT'S DISCRETION TO EXCLUDE CUMULATIVE EVIDENCE. — As to how far a judge may exercise his discretion in a jury trial to exclude relevant evidence on the ground that it is merely cumulative, there is a great conflict of opinion except in two classes of cases. It is the uniform rule that expert evidence should be confined within reasonable bounds. From its very nature an indefinite number of witnesses might otherwise be called, each necessitating so much additional expense, vexation, and delay in demonstrating his competency and presenting his theory. Moreover, while expert witnesses may agree as to essentials, they are very apt to differ upon minor matters. These little discrepancies grow in importance with continued repetition until the juror's mind, seizing upon them as the essentials, distrusts all expert testimony as inherently uncertain. Consequently the trial court has been uniformly allowed to exercise discretionary power in limiting the introduction of such testimony.[1] Likewise, when evidence is introduced to prove character or usage, the same rule applies, for if the best witnesses are not believed, others can hardly be hoped to produce conviction.[2]

In all other cases there is an utter lack of harmony. On the one hand, it is contended that such exclusion may render difficult the task of establishing the point in controversy. On the other, it is argued that the time and energy of the court should not be consumed in hearing and sifting an unending mass of evidence, which has little or no probative value. Influenced by these conflicting motives, different jurisdictions have adopted

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[3] Bigelow, Estoppel, 5th ed., 455.

[1] Fraser *v.* Jennison, 42 Mich. 206.

[2] Bonnell *v.* Butler, 23 Conn. 64, 69.

widely varying rules as to the judge's power of exclusion. Statutes in several states provide that cumulative evidence may be rejected when the issue to which it relates has been settled beyond a reasonable doubt.[3] Such a rule is obviously undesirable in that it compels the judge to pass upon questions of fact before they go to the jury. In some jurisdictions, cumulative evidence may be rejected upon collateral issues, but not upon the main issue.[4] This distinction is clearly unsound, since the reason for rejecting such evidence is that its evil effects outweigh its probative value. In others, the court is denied all power of exclusion except when the fact sought to be established is not controverted.[5] A recent Massachusetts case supports this view, holding that evidence should not be excluded on the ground that testimony already introduced, if believed, amounts to proof. *Perkins* v. *Rice*, 72 N. E. Rep. 323. This rule ignores the fact that the probative value of evidence, merely cumulative in its nature, may be far outweighed by its disadvantages in expense, delay, and confusion to the minds of the jury. The rule which undoubtedly meets with the greatest favor gives the trial judge a discretionary power of exclusion subject to review by the upper court.[6] Upon principle, too, this seems to present the most satisfactory method of procedure, for it tends to keep down the expenses of litigation, prevents the accumulation of a confused mass of evidence from which it is difficult to sift the truth, and secures to the parties a mode of redress in case of possible error.

THE VICE-PRINCIPAL DOCTRINE. — Whatever may be the basis of the fellow-servant doctrine, — whether that doctrine is an application of the general rule that one man is not liable for the torts of another, or is an exception to the principle of *respondeat superior*, — the courts in applying it almost universally rest their decisions upon the theory of assumption of risk. Among the risks which a servant takes upon himself as incident to the employment is that of injury from the negligence of fellow-servants; but risks arising from the negligence of the master he does not assume.[1] As to how far he assumes the risk arising from the negligence of one standing in the master's place, there is a conflict of opinion. By the "superior servant" doctrine, formulated in Ohio,[2] an employee assumes no risk of injury from the negligence of any servant who has control over him. Accordingly the master is liable for injury to a servant resulting from the negligence of the superior servant in doing any act or giving any order within the scope of his authority even though it pertain to some detail in the operation of the business.

Although the courts of several states[3] and the United States Supreme Court[4] approved this view, New York adopted as the true test of the master's liability, not the rank of the negligent servant, but the character of the negligent act.[5] The master owes to the servant certain duties which he dele-

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[3] Cal. Code Civ. Pro. ¶ 2044.
[4] Fisher *v.* Conway, 21 Kan. 18, 24.
[5] Abenheim *v.* Samuels, 5 N. Y. Supp. 117.
[6] Hupp *v.* Baring, 8 Oh. C. Ct. 259; State *v.* Whitton, 68 Mo. 91.

[1] Farwell *v.* Boston & Worcester R. R., 4 Met. (Mass.) 49. In England and several of our states employers' liability has been largely extended by statute.
[2] Little Miami R. Co. *v.* Stevens, 20 Oh. 415.
[3] Walker *v.* Gillett, 59 Kan. 214.
[4] Chicago, etc., R. Co. *v.* Ross, 112 U. S. 377.
[5] Crispin *v.* Babbitt, 81 N. Y. 516.